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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 792

In the Matter of the Application of
PAUL R. BAILLEAUX
for a writ of habeas corpus.

ROBERT A. HEINZE, Warden of the California State Prison at Folsom, California,
Petitioner,

vs.

PAUL R. BAILLEAUX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of California.

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PAUL R. BAILLEAUX,
Respondent.

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Petitioner, Robert A. Heinze, Warden of the California State Prison at Folsom, California, prays that a writ of certiorari issue to review the judgment of

the Supreme Court of California, entered in the above case on October 31, 1956, rehearing applied for and on November 28, 1956, denied.

CITATION TO OPINION BELOW.

The opinion of the Supreme Court of California here under attack is reported as *In re Bailleaux,* 47 Advance Calif. Reports 260, 302 Pac. 2d 801.

JURISDICTION.

The judgment of the Supreme Court of California was entered on October 31, 1956 (App. A). A timely petition for a rehearing was filed on November 9, 1956, and was denied on November 28, 1956 (App. A, p. xi.)

The jurisdiction of this court is invoked under 28 U.S.C. section 1257(3). (Justices Traynor, Schauer and Spence voting for a rehearing.)

QUESTION PRESENTED.

1. Are the conclusions of a United States District Court in a foreign district rendered in a habeas corpus proceeding attacking a warrant of extradition binding on California courts under the Full Faith and Credit Clause of the United States Constitution in subsequent habeas corpus proceeding attacking the judgment of a California court?

2. Can a United States District Court in a foreign district in a habeas corpus proceeding attacking an extradition warrant determine California parole matters concerning a California prisoner which determination will be binding on the California authorities under the Full Faith and Credit Clause of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED.

Article IV, section 1. Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other state. . . .

STATEMENT OF THE CASE.

1. The facts.

In September 1939, Bailleaux was convicted in California of robbery in the first degree and sentenced to San Quentin Prison for the term prescribed by law. In 1942 he was released from San Quentin on parole.

In November 1943 the California authorities suspended Bailleaux's parole because he had while on parole committed armed robbery in the State of Washington and ordered that he be retaken and returned to California's custody when he was released or discharged from the Washington State Penitentiary.

When the petitioner was released from the Washington prison California attempted to extradite him.

He was taken into custody pursuant to a warrant of extradition issued by the Governor of Washington. He then applied to the United States District Court for the Eastern District of Washington, Southern Division, hereinafter called the Federal Court, for a writ of habeas corpus. On January 17, 1949, that court entered an order granting the application and directing the agent of the State of California to release the petitioner. Pursuant to this order he was released from custody.

Subsequently the petitioner went to the State of Oregon. In May 1953, he was returned from Oregon to California and placed in San Quentin. The Adult Authority held a hearing on charges of parole violation, and on August 6, 1954, the petitioner's parole was revoked.

2. The Federal District Court litigation.

After Bailleaux was apprehended pursuant to a warrant of extradition issued by the Governor of Washington authorizing his return to California he filed a petition for habeas corpus. The California Adult Authority, a California governmental agency, several fictitious parties, an unnamed agent of California and one Titus Oates were named as respondents.

The Attorney General of the State of Washington filed a return to an order to show cause on behalf of "the above named respondents" and alleged that Bailleaux was "retained and confined in the Walla Walla County Jail at Walla Walla, Washington,

pending release into the custody of V. R. Massey, agent of the State of California for transfer to that state, *all pursuant to the said warrant of extradition.* (See Answer to Petition and Order to Show Cause).

The district judge ordered the discharge of Bailleaux on the ground that he was being held "in violation of his constitutional rights and that he [was] not a fugitive from justice of the State of California but had been fully discharged and released by the respondents and should be freed from the custody of the agents of said authority" (Order of the U. S. District Court, E.D., Wash., Jan. 17, 1949).

Although the order of discharge, a portion of which has been quoted above, is couched in orthodox language the motivating facts appear from the oral ruling of the judge which we here set forth:

"RULING OF THE COURT

Walla Walla, Washington,
January 17, 1949

Honorable Sam M. Driver, United States District Judge.

Judge Driver. This is a case that on the question of common fairness strongly appeals to the Court. I have never believed in 'pouring it on' these men who have been convicted of offenses, and making them serve, in effect double time for their transgressions. I've always been very strongly against this policy that is sometimes followed, if a man commits a series of offenses, of convicting him on one, and then coming back and convicting him of others after he's served it. That makes a man a poor prospect for reforma-

tion and I don't think society's interests are bettered by that policy.

Here I have no brief or excuse for this man; he's committed two very serious offenses, and no doubt was properly convicted and confined, but from a practical standpoint, if he hadn't told me, I would have known that the parole board here would have taken into consideration the fact that he had a prior conviction, and would have increased his term of confinement because of that prior conviction. He now has to go back to California and serve that sentence, and he is in effect being compelled to serve double time on that sentence.

Furthermore, I have the utmost confidence in the parole board of the State of Washington, and I don't believe they would have paroled this man short of his term of confinement here unless in their judgment he was a fit subject for parole and a safe man, as it appeared to them, to be released for civilian pursuits.

This man looks to me as if he had the capacity to be a very useful citizen. I don't think he should be confined any longer. I'm not too sure of my legal authority, but I'm going to exercise it, and if California wants him badly enough, they can appeal to a higher court and perhaps reverse me, but I'm not too much concerned about that.

I'm going to grant this petition for habeas corpus and order the petitioner released on the writ. I might say to this petitioner that the court is taking quite a lot of responsibility in doing that, and if you go out and commit some offense again, I could probably be blamed for it, and I

would be, so that I hope that you won't let me down.

Mr. Bailleaux. I won't your Honor.

The Court. So that the petition will be granted.

Mr. Bailleaux. Thank you, your Honor."

3. The California litigation.

The California authorities subsequently apprehended Bailleaux in Oregon where he was again in prison and removed him to California and placed him in the custody of the Warden of the State Prison at Folsom, California, where he was held pursuant to the original California commitment (Petition for habeas corpus, p. 4).

In due course, Bailleaux instituted habeas corpus proceedings in the California Supreme Court which culminated in the judgment now under attack.

Bailleaux contended in the California Supreme Court that "it would thus appear that the judgment of the District Court of the United States, discharging him from the custody of the California agent upon constitutional grounds is binding on the [California] court by the full faith and credit provisions of Article IV, Section 1, of the United States Constitution" (page 11 of Bailleaux's petition for habeas corpus).

The California Supreme Court agreed with him.

REASONS FOR GRANTING THE WRIT.

The Supreme Court of California felt compelled to grant full faith and credit to the judgment of the United States District Court because:

> "The parties to the Washington proceeding were essentially the same as those now before this court—the petitioner and the State of California. The Federal Court held that the petitioner was no longer subject to the terms and conditions of his parole." (47 A.C. 263).

I. BEFORE THE FULL FAITH AND CREDIT CLAUSE CAN BE EFFECTIVE THE COURT OF THE FOREIGN JURISDICTION MUST HAVE HAD JURISDICTION OF BOTH THE PARTIES AND THE SUBJECT MATTER.

1. The parties.

The decision complained of states in effect that California was a party to the federal case.

But this could not possibly be the fact.

Bailleaux was in custody in the State of Washington pursuant to the process of the State of Washington, i.e., a governor's warrant of extradition. The California agent had not even arrived in Washington. Even if he had the process still would have been a Washington warrant.

In this case Bailleaux is in the custody of one Heinze, Warden, pursuant to a judgment of a California court. Heinze was not a party to the Washington proceeding.

2. The subject matter.

The attack in the district court was on the Governor's Warrant. Such an attack is limited to the proceedings leading up to the issuance of the warrant. The California process was not subject to attack in the extradition proceeding.

If Bailleaux was not a fugitive in Washington, that matter is not involved here. Bailleaux is now in California and his status as a fugitive at another time is beside the point.

> "The scope of inquiry in a summary proceeding in habeas corpus to prevent extradition is necessarily narrow, and as a general rule it is necessary and proper to pass only on the legality of the requisition and rendition. The only inquiry to be made is whether the statutory prerequisites have been complied with.' (39 C.J.S. 549, 550.) 'The courts in a habeas corpus proceeding of this kind, where the prisoner is arrested for extradition, cannot go into a trial of the merits of the cause. The proceeding is only an initiatory step to a trial in another state. As to the guilt of the prisoner, they are not allowed to inquire. *Their judicial powers are limited to a determination on the sufficiency of the papers and the identity of the prisoner.*' (Kurtz v. Florida, 22 Fla. 36, 45 [Am.St.Rep. 173].) (Emphasis supplied.)
>
> *In re Kimler,* 37 Cal. 2d 568, 571.
>
> " 'If the court on habeas corpus inquires into the merits of the charge against the prisoner or into the motives which inspired the prosecution in the demanding state, it *exceeds its authority under the constitutional and statutory provisions*

> *regulating the extradition of criminals.* The mandate of the constitution requires "a person charged in any state with a crime" to be delivered by the asylum state to the state whose laws he has violated. That state alone can determine the guilt or innocence of the offending party. The theory and the intention of the constitutional and stautory provisions are that the offender shall be compelled to submit himself for trial to the courts of the state in which the offense was committed, and *hence it would be usurpation of authority for the courts of another state to undertake to determine the question of his guilt in a habeas corpus proceeding.'* (Commonwealth v. Superintendent County Prison, 220 Pa. 401 [69 A. 916, 21 L.R.A. N.S. 939], as quoted in In re Ray, 215 Mich. 156, 165 [183 N.W. 774].)" (Emphasis added)
>
> *In re Kimler,* 37 Cal. 2d 568, 572.

The contention of Bailleaux is similar to the one considered in *Drew v. Thaw,* 235 U.S. 432, 439 wherein Justice Holmes said:

> "But this is not Thaw's trial. In extradiction proceedings . . . the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried . . ., and even if it be true that the argument states a nice question, it is a question as to the law of New York which the New York courts must decide".

3. The federal proceeding is not res judicata.

(a) The federal court not having jurisdiction to inquire into the validity of the California judgment

any findings on the subject implied or otherwise, is not res judicata in the present proceeding.

"In the Hoffmeister case, as here, the petitioner contended that he was not a parole violator. Rosenberg admitted his status as a parolee but argued that he had done nothing contrary to the terms of his parole. Kimler says he is not a parole violator, although substantially charged as such, because his parole became a pardon when the California authorities permitted him to be taken into custody by Illinois. The Supreme Court of Missouri held that Rosenberg's rights were governed by the rule that the asylum state may *not inquire into the guilt or innocence of the accused;* the question presented was for the determination of the demanding state. *This is equally true as to Kimler, and his discharge in habeas corpus in Missouri is not res judicata in the present proceeding. . . .*"

In re Kimler, 37 Cal. 2d 568 at 573.

(b) Neither California nor Warden Heinze were parties before the federal court.

Only the custodian of the prisoner is the proper respondent in a habeas corpus case.

The California Adult Authority was not and is not the custodian of Bailleaux. The answer in the federal court alleged:

"Pursuant to the requisition of the Governor of the State of California, approved as in due form by the Attorney General of the State of Washington, said warrant of extradition was properly issued by the Governor of the State of Washington, and it is by virtue of said warrant

of extradition that petitioner is now retained and confined in the Walla Walla County Jail at Walla Walla, Washington, pending release into the custody of V. R. Massey, agent of State of California, for transfer to that state."

The warrant of extradition was the process of the State of Washington and no matter what the formal recitals of the answer and judgment of the federal court state, the legality of that order was the only matter that could have been in issue.

Bailleaux was not even in the custody of an agent of California.

If he had been, the custody would have been pursuant to the process of the State of Washington.

The Adult Authority is a part of the executive branch of the government of California, and neither it nor the State of California were proper parties to the proceeding. The averments of the answer or judgment to the contrary notwithstanding they did not appear in the action. The Attorney General of California is the only person who can represent California or its agencies. The Attorney General of Washington was representing the Washington official who had Bailleaux in custody.

We cannot consider the order of the federal court in a vacuum. The oral opinion of the court doesn't mention any issue concerning the validity of the California judgment. The court states in part:

"I have never believed in 'pouring it on' these men who have been convicted of offenses.

* * *

"This man looks to me as if he had the capacity to be a very useful citizen. I don't think he should be confined any longer."

Not only was the judge wrong on the law — he was wrong in his appraisal of Bailleaux who was arrested later in Oregon.

Judge Driver was trying to function as a parole authority and was using the habeas corpus proceeding as a vehicle.

We are not bound by the averments contained in the judgment of the federal court. They may be attacked collaterally.

"Turning to the federal decisions, we find the law laid down in Board of Public Works v. Columbia College, 17 Wall. (U.S.) 521, 528, 21 L. Ed. 687, 691, as follows: 'The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit.'

"In Thompson v. Whitman, 18 Wall. (U.S.) 457, 469, 21 L. Ed. 897, 902, upon full consideration, it was said: 'On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790 [28 U.S.C.A. § 687], and notwithstanding the averments contained in the record of the judgment

itself.' These holdings have been repeatedly indorsed and reaffirmed by the Federal Supreme Court, and have never been departed from. (Citing cases)

"And this is the rule even when the inquiry necessitates disputing jurisdictional facts positively asserted in the judgment record. (Citing cases)

"The due process clause of the Fourteenth Amendment and the full faith and credit clause are very closely related. They are, in most cases, if not in all, to be considered together." *In re Hanrahan's Will,* 194 Atl. 471, 476.

The requirement of the Federal Constitution that full faith and credit shall be given in each state of the public acts, records and judicial proceedings of each other state does not contemplate that an invalid judgment or decree shall thereafter be automatically validated. This rule applies to jurisdiction over the subject matter as well as the person. *In re Philadelphia Rapid Transit Co.,* 217 Fed. 2d 730.

An inquiry into the jurisdiction of the court over the subject matter is always in order.

"Each state of the Union is sovereign and under the federal Constitution full faith and credit must be given judgments of each state by every other state within the Union. Art. IV § 1, Constitution, U.S.C.A. Full faith and credit means that a judgment in one state must in the other state be given the full effect it is given by the law and usage in the state of its origin. And, too, the judgments of a state must be given the

same full faith and credit in federal courts. (Citing cases). *Such meaning obviously presupposes that the judgment is within the subject matter jurisdiction of the court pronouncing it. Hence inquiry on that point is always in order.* Tilt v. Kelsey, 1907, 207 U. S. 43, 59, 28 S. Ct. 1, 52 L. Ed. 95." (Emphasis added). *Nelson v. Miller,* 201 Fed. 2d 277 at 279.

Neither the present custodian nor the People of the State of California having been before the federal court is estopped from attacking the judgment. Indeed, the People of the State of California could not be sued in the federal court.

The State is not a proper party to a habeas corpus proceeding in a federal district court and to so join the state as a party would be a violation of the *Eleventh Amendment of the United States Constitution.*

The theory sustaining habeas corpus proceedings in federal courts where a state prisoner is involved has always been that if the petitioner is being detained in violation of his *constitutional rights,* the state officer so detaining the petitioner is acting beyond his authority as a state officer.

The State of Pennsylvania expressly attacked habeas corpus proceedings as unconstitutional in violation of the Eleventh Amendment in the case of *Ex rel. Elliott v. Hendricks,* 213 Fed. 2d 922, on the ground that the proceeding was a suit against the state in violation of the Eleventh Amendment. The court, however, stated:

"But we think to argue that the habeas corpus proceeding is a suit against Pennsylvania is not an accurate way to describe its nature . . . the writ proceeds against the custodian. . . ."

Likewise see the statement in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, at 689, 690, and *Ex parte Young*, 209 U. S. 123, 167-168, both relying on the theory that the act of the officer against whom the relief is sought is beyond the officer's power and thus not the conduct of the state.

4. Because of failure to exhaust state remedies the federal court did not have jurisdiction.

Bailleaux not having attacked in the state courts his custody under the Governor's Warrant the federal court had no jurisdiction.

Section 2254, Title 28, U.S.C. provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented."

There is no allegation nor could there be one to the effect that Bailleaux had attacked his imprisonment in either the Washington or California courts.

He went directly into the federal court and under the quoted section that court had no jurisdiction to make the order granting the writ of habeas corpus and discharging the prisoner.

If Bailleaux was attacking *the judgment* of the California court and if the federal court was attempting to invalidate that *judgment,* then it would have no jurisdiction until a showing was made that Bailleaux had exhausted his state remedies *(United States v. Ragen,* 153 Fed. 2d 902).

Scores of cases could be cited to support this proposition but we shall cite but three: *United States v. Ragen,* 153 Fed. 2d 902; *Hawk v. Jones,* 160 Fed. 2d 807; *Canada v. Jones,* 160 Fed. 2d 811.

If it should be suggested that the United States Court of Appeals should have been asked to correct this erroneous assumption of jurisdiction, it will be remembered that neither California, its agents nor the warden were before the federal court. Only the local jailer represented by the Attorney General of Washington was a party defendant.

The federal court judgment could only find (if it had any jurisdiction at all) that Bailleaux was not a "fugitive". But that issue is not in this case. Bailleaux is now in California and any question as to his being a fugitive is moot.

In the case of *Letwick v. State,* 198 S.W. 2d 830, the court held that a finding of a court in a habeas corpus proceeding that the petitioner was not the person charged with the crime was not *res judicata* in a second extradition proceeding where it was admitted that the same person and the same offense were involved in both the extradition and habeas corpus proceedings.

II. NATURE OF EXTRADITION PROCEEDINGS AND HABEAS CORPUS INCIDENT THERETO.

An extradition proceeding is in the nature of preliminary examination to ascertain whether or not there is reason to return an individual from the asylum state to the demanding state for the purpose of answering on the merits. Such a preliminary examination constitutes no bar to a subsequent examination before another magistrate nor is it a trial in any sense, and does not operate to put the defendant in jeopardy.

United States ex rel. Rutz v. Levy, Marshal, 268 U.S. 390, 69 L. Ed. 1010;

People ex rel. Mark v. Toman, 362 Ill. 232, 199 N.E. 124, 102 A.L.R. 379;

2 *Moore on Extradition,* § 626;

22 *Am. Jur.* 296.

These authorities are controlling.

III. WHAT HAPPENED TO PETITION IN WASHINGTON IS OF NO CONCERN HERE.

Petitioner is held under an unexpired sentence evidenced by a commitment issued by the superior court.

The sole question here under consideration is: Is the petitioner held under a valid commitment?

We are not concerned with what happened to petitioner in Washington or with any of the endeavors of the law to get him here.

CONCLUSION.

Unless certiorari is granted to correct the conclusions of the California Court the federal courts will become monitors of the state prisons and will be able to control and review the actions of those entrusted with the parole function of the several states.

Dated, San Francisco, California,
February 20, 1957.

Respectfully submitted,

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CLARENCE A. LINN,
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Attorneys for Petitioner.

(Appendix A Follows.)

Appendix A

(Vol. 47 A.C. 260.)

In the Supreme Court of the State of California

Criminal No. 5808

IN BANK

In the Matter of the Application of PAUL R. BAILLEAUX for a writ of habeas corpus.

ROBERT A. HEINZE, Warden of the California State Prison at Folsom, California,

Petitioner,

vs.

PAUL R. BAILLEAUX,

Respondent.

OPINION

By this petition for the writ of habeas corpus, Paul R. Bailleaux seeks his release from Folsom prison. The warden as respondent has filed a return. Issues of fact were raised which would ordinarily require a reference. In order to obviate the necessity

for such a proceeding counsel for the petitioner and the respondent filed certain documents and have joined in a stipulation of facts in which it is agreed that the documents and the stipulation disclose all of the material facts and that matter may be disposed of on the record thus presented.

In September, 1939, the petitioner was convicted of robbery in the first degree and sentenced to San Quentin Prison for the term prescribed by law. In 1942 he was released from San Quentin on parole, subject to the terms and conditions set forth in the "ticket of leave" given him. On October 5, 1943, the Chief Parole Officer of the State of California submitted a report to the Board of Prison Terms and Paroles (the predecessor of the Adult Authority), charging that the petitioner had violated his parole by committing an armed robbery in the State of Washington. The report described the circumstances of the robbery and recommended that the petitioner's parole be revoked and that he be returned to San Quentin "at such time as he will be eligible for release or discharge from the Washington State Penitentiary." In November, 1943, the board suspended the petitioner's parole pending investigation of the parole officer's charges and ordered that he be retaken and returned to custody to abide the further order of the board.

When the petitioner was released from the Washington prison California attempted to extradite him. He was taken into custody pursuant to a warrant of extradition issued by the Governor of Washing-

ton. He then applied to the United States District Court for the Eastern District of Washington, Southern Division, hereinafter called the Federal Court, for a writ of habeas corpus. On January 17, 1949, that court entered an order granting the application and directing the agent of the California Adult Authority to release the petitioner. Pursuant to this order he was released from custody.

Subsequently the petitioner went to the State of Oregon. In May, 1954, he was returned from Oregon to San Quentin. The Adult Authority held a hearing on charges of parole violation, and on August 6, 1954, the petitioner's parole was revoked.

The petitioner's primary contention is that the order of the Federal Court issuing a writ of habeas corpus and discharging him is res judicata of the issue of the right of California to reimprison him.

Full faith and credit must be accorded a judgment of the federal court. (*Stoll* v. *Gottlieb*, 305 U.S. 165, 170 [59 S. Ct. 134, 83 L.Ed. 104]; *Hancock Nat. Bank* v. *Farnum*, 176 U.S. 640, 641-642 [20 S. Ct. 506, 44 L.Ed. 619]; *Mueller* v. *Elba Oil Co.*, 21 Cal.2d 188, 205 [130 P.2d 961]; Code Civ. Proc., § 1908.) Such a judgment has the same effect in the courts of this state as it would in a federal court. (*Bank of America* v. *McLaughlin Land & Livestock Co.*, 40 Cal.App.2d 620, 626-627 [105 P.2d 607]; 29 Cal.Jur.2d § 303, pp. 288-289.) In the federal jurisdiction, as in the courts of California, the doctrine of res judicata prevents the relitigation of issues determined by a final judgment in a prior action between the same

parties. (*United States* v. *Munsingwear, Inc.,* 340 U.S. 36 [71 S.Ct. 104, 95 L.Ed. 36]; *Southern Pac. R. Co.* v. *United States,* 168 U.S. 1 [18 S.Ct. 18, 42 L.Ed. 355], and cases cited therein; *Norris* v. *San Mateo County Title Co.,* 37 Cal.2d 269, 273 [231 P.2d 493]; *Bernhard* v. *Bank of America,* 19 Cal.2d 807, 813 [122 P.2d 892]; Code Civ. Proc., § 1908). This doctrine is applicable to the petitioner's case. (*United States* v. *Chung Shee,* 76 F. 951 [22 C.C.A. 639]; *Montgomery* v. *Eldson,* 123 F.Supp. 292; *Ex parte Gagliardi,* 284 F. 190; 2 Freeman, Judgments, 5th ed. 1925, pp. 1761-1763; see *In re Begerow,* 136 Cal. 293, 297-298 [68 P. 773, 56 L.R.A. 528].) In the present proceeding a hearing was held in the Federal Court and its judgment became final. The judgment reads in material parts as follows:

"The above entitled cause coming on for hearing before the Court on this 17th day of January, 1949, the petitioner appearing in person and by his attorney, W. A. Toner, and the respondent, Vard Ryan Massey, appearing by Jane Dawdle, Assistant Attorney General of the State of Washington, and the Court having heard the testimony of the petitioner and being fully advised in the matter, now finds that the said petitioner is being detained by the respondent as agent of the California Adult Authority in violation of his constitutional rights and that he is not a fugitive from justice of the State of California but has been duly discharged and released by the respondents and should be freed from the custody of the agents of said authority.

"Now Therefore It Is Considered, Ordered, Adjudged and Decreed: That the said petition for habeas corpus be and the same hereby is allowed and granted, and it is further ordered that the respondent release the said petitioner forthwith."

The parties to the Washington proceeding were essentially the same as those now before this court—the petitioner and the State of California. The Federal Court held that the petitioner had been released by California from his obligations to the state and was no longer subject to the terms and conditions of his parole. If that judgment is res judicata, the 1954 order of the Adult Authority revoking the petitioner's parole was of no avail.

The respondent contends that the Federal Court erred in holding that the petitioner was no longer subject to the terms and conditions of his parole from the California court. This is a collateral attack on a final judgment, and such an attack is permitted only under limited circumstances. One circumstance is where the court entering the judgment was without jurisdiction. (*Williams* v. *State of North Carolina*, 325 U.S. 226 [65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366]; *Pennoyer* v. *Neff*, 95 U.S. 714 [24 L.Ed. 565]; *Thompson* v. *Whitman*, 18 Wall. (U.S.) 457 [21 L.Ed. 897]; *Gagnon Co., Inc.* v. *Nevada Desert Inn, Inc.*, 45 Cal.2d 448 [289 P.2d 446]; Code Civ. Proc., § 1916.) Accordingly the respondent asserts that the Federal Court was without jurisdiction to discharge the petitioner. This question is to be determined in accordance with federal law. (*Sherrer* v.

Sherrer, 334 U.S. 343 [68 S.Ct. 1087, 1091, 92 L.Ed. 1429, 1 A.L.R.2d 1355]; *Adam* v. *Saenger,* 303 U.S. 59 [58 S.Ct. 454, 82 L.Ed. 649]; *Gagnon Co., Inc.* v. *Nevada Desert Inn, Inc.,* supra, 45 Cal.2d 448; *Cellulose Package Mfg. Co.* v. *Calhoun,* 166 Cal. 513 [137 P. 238].)

In the federal courts a collateral attack on the ground of lack of jurisdiction will not be permitted unless the attacking party makes an affirmative showing that the issue of jurisdiction was not litigated in the court entering the judgment under attack. If the issue of jurisdiction was litigated in the first court, the determination thereon is final as against a collateral attack. (*Davis* v. *Davis,* 305 U.S. 32 [59 S.Ct. 3, 83 L.Ed. 26, 118 A.L.R. 1518]; *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U.S. 522 [51 S.Ct. 517, 75 L.Ed. 1244]; *Mueller* v. *Elba Oil Co., supra,* 21 Cal.2d 188.) If the attacking party fails to show that the issue of jurisdiction was not litigated in the first court, the federal courts will assume that this issue was litigated. (*Cook* v. *Cook,* 342 U.S. 126 [72 S. Ct. 157, 96 L.Ed. 146]; *Bostwick* v. *Baldwin Drainage Dist.,* 133 F.2d 1, cert. denied, 319 U.S. 742 [63 S.Ct. 1030, 87 L.Ed. 1699]; *In re Eichhoff,* 101 Cal. 600 [36 P. 11]; 29 Cal.Jur.2d, § 201, pp. 155-156.) There is no showing in this record to indicate that the issue of jurisdiction was not litigated in the Federal Court.

The respondent relies on *In re Kimler,* 37 Cal.2d 568 [233 P.2d 902]. That case is not controlling. Here we are concerned with the effect of a prior

judgment of a federal court in which that court had determined the precise question which the respondent now seeks to relitigate, namely, whether the custody of the petitioner was lawful. In the Kimler case this court said at page 570 that the "Missouri court did not purport to determine the effect of Kimler's release by the prison authorities of" California, and that by "the clear language of the Missouri judgment, the only fact determined was that the 'facts and circumstances are not sufficient to justify extradition.'" Here the federal court determined the effect of the release of the petitioner by the California authorities. It had jurisdiction to do so and its judgment should be respected.

We conclude that the judgment of the Federal Court is res judicata; that the reimprisonment of the petitioner was unlawful and that he is entitled to be released from custody.

The petitioner is discharged.

Shenk, J.

Gibson, C. J., Traynor, J., Schauer, J., Spence J., and McComb, J., concurred.

CONCURRING OPINION

Carter, J.—I concur in the result reached in the majority opinion inasmuch as it is directly in line with my dissent in *In re Kimler* (1951), 37 Cal.2d 568, 575 [233 P.2d 902].

In the Kimler case a judgment of a Missouri court was involved. Kimler was released on habeas corpus

by the Missouri court and a majority of this court there said: "The judgment [of habeas corpus] declared that ' . . . *no sufficient cause for the detention* of said petitioner appearing, it is ordered . . . that the Writ of Habeas Corpus be sustained and made permanent, and that the petitioner . . . be . . . discharged from imprisonment and detention for the cause aforesaid.' (Italics added.)" A majority of this court specifically there held that Kimler's "discharge in habeas corpus in Missouri is not res judicata in the present proceeding." In the Kimler case a majority of this court relied upon *State* v. *Hoffmeister,* 336 Mo. 682 [80 S.W.2d 195],* in holding that the Missouri discharge of Kimler was not res judicata. The holding in the Hoffmeister case was that the asylum state could not inquire into the guilt or innocence of the accused; that the question presented was for the determination of the demanding state. In the Kimler case it was held that the prisoner was entitled to release because no sufficient cause for his release appeared. But a majority of this court held that the Missouri judgment was not entitled to full faith and credit *even though* the Missouri court in the Kimler case must have been well aware of its holding in the Hoffmeister case together with the facts and circumstances involved therein. In other words this court knew better what the Supreme Court of Missouri held than the Supreme Court of Missouri did! (See also *Ex parte Messina,* 233 Mo. App. 1234 [128 S.W.2d 1082].)

*This case was decided by the Supreme Court of Missouri in *1935.*

I said in my dissent to the Kimler case (p. 579): "The discharge of Kimler in Missouri must be treated as res judicata on the issue above mentioned, that is, that there is no longer any basis for California to imprison Kimler arising from his conviction here, and therefore he is entitled to a discharge in this proceeding." This court, or a majority thereof, held, however, in the Kimler case that Kimler's discharge on habeas corpus by the Missouri court was not res judicata. This despite the fact that the opinion in that case shows, without a shadow of a doubt, that the merits were adjudicated by the Missouri court. In its holding the majority blithely ignored the full faith and credit clause of both the federal and state Constitutions. Here, however, the majority has, apparently, had a change of heart because we are told that full faith and credit must be accorded a judgment of the federal court; that the doctrine of res judicata prevents the relitigation of issues determined by a final judgment in a prior action between the same parties. In other words—once is enough. With this I wholeheartedly agree. However, this case and the Kimler case were both previously adjudicated on the merits with diametrically opposite results reached by a majority of this court. The only dissimilarity between the two is that here a prior judgment of a federal court is concerned; in the Kimler case a prior judgment of a sister state was concerned. Otherwise there is no difference. The Missouri court in the Kimler case specifically noted that the "facts and circumstances are not sufficient to justify the surrender and extradition of the petitioner

to the State of California"; the federal court in the case at bar specifically found that the petitioner was not a "fugitive from justice of the State of California but has been duly discharged and released by the respondents and should be freed from the custody of the agents of said authority." It is difficult to see how two cases could be more similar inasmuch as this court must give full faith and credit to the judgments of the courts of both sister states and the federal government.

Even though I am of the opinion that the conclusion reached here is in conflict with that reached in the Kimler case, I am happy to concur in the result reached herein because it is sound law.

Filed October 31, 1956.
William I. Sullivan, Clerk.

Order Due
November 30, 1956

Crim. No. 5808

In the Supreme Court of the State of California

In Bank

In re Bailleaux on Habeas Corpus.

ORDER DENYING REHEARING

Respondent's petition for rehearing DENIED.

Traynor, J., Schauer, J., and Spence, J., are of the opinion that the petition should be granted.

Gibson,
Chief Justice.

Filed Nov. 28, 1956.
William I. Sullivan, Clerk.
By Joseph M. Rogers,
S. F. Deputy.